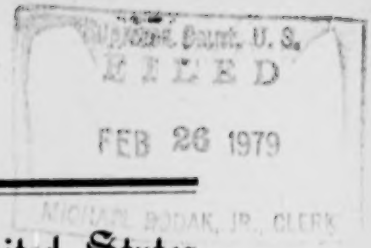


No. 78-1089



---

**In the Supreme Court of the United States**

**OCTOBER TERM, 1978**

**RKO GENERAL, INC., PETITIONER**

**v.**

**MULTI-STATE COMMUNICATIONS, INC., ET AL.**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

---

**MEMORANDUM FOR THE FEDERAL COMMUNICATIONS  
COMMISSION IN OPPOSITION**

---

**WADE H. MCCREE, JR.**  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

**ROBERT R. BRUCE**  
*General Counsel*  
*Federal Communications Commission*  
*Washington, D.C. 20554*

---

*In the Supreme Court of the United States*

OCTOBER TERM, 1978

---

No. 78-1089

RKO GENERAL, INC., PETITIONER

v.

MULTI-STATE COMMUNICATIONS, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT*

---

**MEMORANDUM FOR THE FEDERAL COMMUNICATIONS  
COMMISSION IN OPPOSITION**

---

1. This case involves a television licensing proceeding commenced by the Federal Communications Commission in 1974. The two applicants in the proceeding had filed mutually exclusive applications to operate a television station in New York City. Petitioner RKO General, the current licensee, sought renewal of its license. Respondent Multi-State Communications, Inc., sought a construction permit to build and operate a new station. Because the applications were mutually exclusive, the Commission designated them for a comparative hearing to determine which would best serve the public interest. Multi-State claimed that it had reasonable assurance of receiving a \$4 million loan from Chase Manhattan Bank to cover its construction and initial operating costs. After the deposition testimony of the bank's vice president raised doubts on this point, the Commission directed that

evidence be adduced relating to the bank loan commitment which formed the basis of Multi-State's financial showing (Pet. App. 2d-4d).

After hearings on the financial issue, the Administrative Law Judge issued a partial initial decision concluding that "this record affirmatively proves that there is absolutely no ground for any belief by either Multi-State or the Commission that there is any assurance, reasonable or otherwise, that the loan will actually be made" (Pet. App. 11d). The Administrative Law Judge acknowledged that when an applicant bases its showing of financial ability to construct and operate a station on a bank loan commitment, the Commission does not require a legally binding commitment. "Rather, an applicant is obligated to prove that there is 'reasonable assurance' that the bank actually intends to make the loan" (Pet. App. 10d). The Administrative Law Judge nonetheless determined, on the basis of the bank officials' testimony at the hearing, that "the bank feels no degree of commitment whatsoever, and believes it has only expressed interest in a future loan application" (Pet. App. 11a).<sup>1</sup>

On review of the partial initial decision, the Commission agreed with the Administrative Law Judge that Multi-State had no reasonable assurance of receiving a loan, and therefore was not financially qualified to construct and operate the proposed station (Pet. App. 1b, 6b-7b):

[W]e are persuaded, in agreement with the ALJ, that no reasonable assurance of the availability of a \$4,000,000 loan has been demonstrated \* \* \*. The

<sup>1</sup>At the hearing, a bank official was asked, "whether as of this time, Chase Manhattan or you as an officer of Chase Manhattan have received the information upon the basis of which you could give any reasonable assurance that when requested to do so, you would make a \$4,000,000 loan to Multi-State." The bank official responded, "No, sir" (Pet. App. 6d; see generally, Pet. App. 4d-10d).

testimony of Mr. Jones [an official of the bank] establishes that neither at the time of the issuance of the bank letter nor at the time of the hearing [has] Chase Manhattan made a determination that the loan would be made \* \* \*.

The court of appeals reversed and remanded for further proceedings in which Multi-State will not be disqualified because of the unavailability of the bank loan. The Court concluded that the record evidence does not support the Commission's holding that Multi-State failed to establish its financial qualifications (Pet. App. 1a, 5a). The Court stated that the testimony of the bank officer at the hearing did not supersede the bank loan letter, which indicated a present firm intention to make a loan (Pet. App. 6a-7a).

2. The court of appeals erroneously substituted its judgment on the weight of the evidence for that of the Commission. The error is not sufficiently important, however, to merit review by this Court.

Sections 308(b) and 309(a) of the Communications Act, 47 U.S.C. 308(b) and 309(a), require the Commission to assess the adequacy of an applicant's financial qualifications before granting a station license application. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). Congress delegated authority to the Commission to devise standards to measure financial qualifications under this statutory mandate.

The Commission permits applicants to rely on promised bank loans to demonstrate financial eligibility when they have a "reasonable assurance" that the loans will be available at the proper time. See, e.g., *Crosby N. Boyd (Washington Star)*, 57 FCC 2d 475, 487-490 (1976). In the present case, although the Commission initially determined that the bank loan letter submitted by Multi-State met this standard, further consideration led the

Commission to conclude that it had misunderstood the meaning of the letter, and that the letter did not constitute a "reasonable assurance" that the loan would be granted.

The court of appeals should have deferred to the Commission's evidentiary determination here. By substituting its own judgment for the Commission's, the court violated the well-established principle that it is for the agency, not the reviewing court, to weigh and interpret the evidence. See *Ralston Purina Co. v. Lousiville & Nashville R. Co.*, 426 U.S. 476 (1976); see also *FCC v. National Citizens Commission for Broadcasting*, 436 U.S. 775 (1978). Nonetheless, the court of appeals did not substantially undermine any Commission policy. Its reversal of the Commission's finding on a limited evidentiary issue in this case, though erroneous, is not important enough to call for this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

ROBERT R. BRUCE  
*General Counsel*  
*Federal Communications Commission*

FEBRUARY 1979